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2014 MAY 12 P 4:57

May 7, 2014

Office of General Counsel
National Transportation Safety Board
490 L'Enfant Plaza East, S.W., Room 6401
Washington, D.C. 20594

RE: Administrator v. Pirker. Docket No. CP-217

Dear Mr. Tochen:

Please be advised that we are the attorneys for over 20 interested parties who have asked that we file this Amici Curiae Brief for them in the appeal of the above-referenced matter.

In addition on this date, we have sent a pdf copy electronically via email of the foregoing document to:

ALJappeals@ntsb.gov
BoardAppeals@ntsb.gov
BSchulman@KRAMERLEVIN.com
susan.caron@faa.gov

We can be contacted at the above address and phone numbers.

Thank you for your attention to this matter of national importance.

Sincerely,



Michael D. Curran, Esq./ATP

2014 MAY 20 12 58 4: 56

Over the past two years, clients of this firm, who have asked not to be specifically identified herein for fear of additional and future retaliation by the FAA, but number approximately 20, have been threatened by the FAA without legal basis, for the alleged

“illegal/banned” commercial uses of Model Aircraft/UAVs and have been directed to cease and desist use of their Model Aircraft/UAVs for business/commercial purposes.

Our clients have asked this firm to file this *Amici Curiae* on their behalf in support of the well reasoned Decisional Order of Judge Geraghty which has properly addressed the FAA’s attempts to prosecute Mr. Pirker and substitute FAA internal policy memos for proper rulemaking procedures. [See *infra* pgs. 7-9, Decisional Order pgs. 4-7]

Our clients have strong personal/business interests consistent with Mr. Pirker’s interests in this case. Our client’s very much support the safe and conservative operation of their Model Aircraft/UAVs and their current and unlimited potential humanitarian, utilitarian, business and commercial uses. These are issues of national significance and concerns a multi-billion dollar industry in its relative infancy.¹

The Curran and Curran Law firm has as one of its partners, Michael D. Curran, Esq./ATP, who is both a practicing civil litigation/trial and aviation attorney as well as professional pilot/instructor, first certificated by the FAA in 1992. Mr. Curran has earned a private pilot license, a commercial license, an instrument rating, a multi-engine/instrument rating, and for nearly 15 years has proudly held a valid and current FAA single and multi-engine Airline Transport Pilot certificate and Certified Flight Instructor and Instrument Instructor Certificate. Mr. Curran is type certificated and has thousands of professional operational hours under both FAR part 91 and part 135 in the Cessna Citation I, II, V, CJ1, 2, 3 and other turbo-prop/propeller actual “aircraft.”

Mr. Curran also has 25 years of legal and litigation experience and currently divides his professional time between civil litigation, trial work, providing legal/aviation

¹<http://www.auvsi.org/econreport>

consulting and expertise to clients and other attorneys on National Transportation Safety Board [“NTSB”] precedential cases and the Federal Aviation Regulations [“FARs”] and in matters with the Federal Aviation Administration. [“FAA”]

Over the past two years, the Curran Law Firm has specifically assisted numerous clients who design and operate Model Aircraft/Small Unmanned Aerial Vehicles [collectively referred to herein as “Model Aircraft/UAVs”] in various commercial applications, including but not limited to, design/manufacture, aerial photography, search and rescue, mapping, land/ocean inspection, sporting events, etc., all using camera equipped, Model Aircraft/UAVs. Mr. Curran is also a Model Aircraft/UAV enthusiast.

The services to the Curran Law Firm clients have generally included consultation and providing of opinion letters, as well as writing to the FAA directly regarding the historical and current lack of any regulatory/statutory law governing the commercial uses of Model Aircraft/UAVs. A copy of this firm’s recent letter to the FAA, which was prepared for the benefit of our various clients, is attached for this Distinguished Board’s review, which was consistent with opinion letters provided to our clients to assist them with their business/customers. [See FAA letter attached as Ex. B]

For the *Amici* and others similarly situated, they believe this decision by this Distinguished Board Panel can have the effect of ending years of abuses by the FAA.

This case is historic and will be only the second decision in existence (after Judge Geraghty’s Decisional Order) on these matters of significant importance to thousands of United States citizens, certificated pilots and businesses. In addition, as this Distinguished Board Panel realizes, this case and the decision of the NTSB will be a beacon for other countries aviation authorities and their Model Aircraft/UAV flyers.

III. HOW THIS AMICI CAN ASSIST THE NTSB

This *Amici* can assist this NTSB Distinguished Board Panel based on our extensive legal and aviation experience/expertise and being particularly familiar with, and having extensively researched and closely followed the particular issues currently before this full NTSB panel, over the past few years.

The *Amici* believes that they have significant historical, legal and policy analyses to share herein which could be helpful in making this nationally important and historical precedent setting decision in this case.

The *Amici* believe that their interests in this case are similar to the interests of Mr. Pirker and thousands of other US citizens, pilots and businesses involved with Model Aircraft /UAV, design/manufacture and commercial operation.

IV. ISSUES TO BE ADDRESSED BY THIS AMICI

The issues to be addressed by this *Amici*, as partially framed by the Complainant FAA's Petition herein, are as follows:

PROCEDURAL ISSUES

- I. The FAA Did Not have Jurisdiction over Mr. Pirker's Flight, his Model Aircraft/UAV, or the Airspace Transited

SUBSTANTIVE ISSUES

- I. The ALJ was correct in Finding that the Ritewing Zephyr Power Glider Respondent Operated in the Vicinity of the University of Virginia Was Not an "Aircraft" as Defined in 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1?
- II. The ALJ was Correct in Finding that Respondent's Operation of the Ritewing Zephyr Power Glider Aircraft as Described in the Complaint Was Not Subject to Regulation Under the Federal Aviation Regulations?
- III. Safety & Policy Considerations

1. INTRODUCTION AND HISTORICAL SUMMARY

The modern age of powered flight began in 1903, when Orville Wright made the first sustained, powered flight on December 17 in a plane he and his brother Wilbur built. This twelve-second flight led to the development of the first practical airplane in 1905. Model glider and powered airplane hobbyists were flying models just after the Wright Brothers flew the *Wright Flyer* at Kitty Hawk in 1903.²

Model Aircraft/UAVs have been operated in the United States for nearly a century without any Federal regulation. The first National Aeromodeling Championship was held 90 years ago in 1923. By 1936, the American Academy of Model Aeronautics [“AAMA”] had offices located at Rockefeller Center in New York City, later moved to Washington, D.C.. Now located in Muncie, Indiana, they claim over 170,000 members.³

The Civil Aeronautics Authority was established in 1938 pursuant to the Civil Aeronautics Act. In 1958, motivated by the collision of two airliners UA flight 718 and TWA flight 2 over the Grand Canyon in 1956 that killed 128 people, the largest single-incident loss of life in aviation history at the time. Senator A. S. “Mike” Monroney (D-OK) introduced a bill to create an independent Federal Aviation Agency to provide for the safe and efficient use of national airspace.⁴

Subsequent midair collisions with military aircraft in April and May of 1958 increased the sense of urgency. Citing the “recent midair collisions of aircraft occasioning tragic losses of human life,” President Eisenhower signed into law the

²See AAMA History, updated April, 2012 <https://www.modelaircraft.org/files/AMANMAMMAhistory.pdf>

³See <https://www.modelaircraft.org/files/AMANMAMMAhistory.pdf>

⁴https://www.faa.gov/about/history/brief_history/

Federal Aviation Act on August 23, 1958. [P.L. 85-726, 72 Stat. 731, August 23, 1958]

The Act created the Federal Aviation Agency and also set out the scope of its duties and powers. No provision in the legislation addressed Model Aircraft/UAVs. The intent at the time was to clearly address passenger aircraft safety. Thus began the modern era of the Federal Aviation Administration [“FAA”].⁵

Whether or not the FAA had/has the statutory authority to enact law/regulations concerning operation of Model Aircraft/UAVs, decades ago it made clear that their operation was not subject to its FARs and was governed only by “voluntary” guidelines.

On June 9, 1981, the FAA issued Advisory Circular 91-57 [An FAA advisory publication giving non regulatory information/guidance. Advisory circulars do not create or change regulations and are not binding on the public],⁶ as follows;

“Subject: Model Aircraft/UAVs OPERATING STANDARDS

1. PURPOSE. This advisory circular outlines, and encourages voluntary compliance with, safety standards for Model Aircraft/UAVs operators.

2. BACKGROUND. Modelers, generally, are concerned about safety and do exercise good judgement when flying model aircraft. However, model aircraft can at times pose a hazard to full-scale aircraft in flight and to persons and property on the surface. Compliance with the following standards will help reduce the potential for that hazard and create a good neighbor environment with affected communities and airspace users.

3. OPERATING STANDARDS.

a. Select an operating site that is of sufficient distance from populated areas. The selected site should be away from noise sensitive areas such as parks, schools, hospitals, churches, etc.

b. Do not operate model aircraft in the presence of spectators until the aircraft is

⁵See Federal Aviation Administration, A Brief History of the FAA, *available at* http://www.faa.gov/about/history/brief_history/ (last modified Feb. 1, 2010).

⁶See FAA AC 00-2.11; <http://aviation.about.com/od/Glossary/g/Advisory-Circular.htm>

successfully flight tested and proven airworthy.

c. Do not fly model aircraft higher than 400 feet above the surface. When flying aircraft within 3 miles of an airport, notify the airport operator, or when an air traffic facility is located at the airport, notify the control tower, or flight service station.

d. Give right of way to, and avoid flying in the proximity of, full-scale aircraft. Use observers to help if possible.”

As indicated in the first paragraph, AC 91-57 encouraged “voluntary compliance” by operators of Model Aircraft/UAVs to its provisions. By definition, it certainly was not a law, or even regulatory and the FAA made clear Model Aircraft/UAVs were only subject to voluntary standards, not any actual FAR.

For the next 24 years, AC 91-57 was the FAA’s sole offered guidance on the operation of Model Aircraft/UAVs. The 400 ft. altitude ceiling above the surface, or above ground level [“AGL”] was apparently based on the FAR minimum safe altitude for aircraft in unpopulated areas of 500ft AGL.⁷ By its own terms, AC 91-57 suggested and could only require “voluntary” compliance.

Prior to this case, AC 91-57 had never been cited as a basis for regulatory enforcement. An advisory circular, by definition is not regulatory, it does not provide requisite notice of any consequences for alleged violation (because there are none). It does not suggest that Model Aircraft/UAVs operation could, under any circumstances, instead fall subject to any FARs that apply to actual “aircraft.”

The absence of any enforceable regulation concerning Model Aircraft/UAVs operation is confirmed by the complete absence of FAA or NTSB enforcement

⁷See FAR §91.119, see also 49 U.S.C. § 40102 “navigable airspace means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.”

action/precedential decisions in the historically very rare documented instances where Model Aircraft/UAVs operation have in fact caused property damage, or injury. In fact, there has never been a single FAR issued in FAA history that regulates Model Aircraft/UAVs.⁸

However, in 2005 seemingly based on public/political pressures, and despite the lack of any actual regulation, the FAA turned its attention toward unprecedented attempts at regulating Model Aircraft/UAVs. The FAA for their own purposes termed these devices Unmanned Aircraft Systems [“UAS”] or Drones to align with their attempts at enforcement. [See Decisional Order p. 6 fn. 19] This terminology also unfortunately, derives from military operations where military remotely-piloted vehicles have been used to launch deadly attacks, in some cases inflicting civilian casualties.

The national political debate concerning military “Drone” use has spilled over into perceptions of how civilian Model Aircraft/UAVs which the FAA elects to call UAS are or will be used in the United States. Civil Model Aircraft/UAVs are capable of numerous beneficial purposes such as search and rescue, agriculture, mapping, aerial photography, wildlife monitoring and research, as well as countless other utilitarian uses.

It is with this historical and political background that on September 16, 2005, the FAA issued a policy memorandum entitled “AFS-400 UAS POLICY 05-01 - Unmanned Aircraft Systems Operations in the U. S. National Airspace System - Interim Operational Approval Guidance.” This interim internal FAA memo expressly confirms that “[t]his policy is not meant as a substitute for any regulatory process.” Still, it sets out criteria

⁸Complainant FAA’s Brief does not cite to any applicable FAR, or precedent for the regulation of Model Aircraft/UAVs, they cannot, it has never existed in history.

claiming to require a Certificate of Authorization or Waiver [“COA”] to use unmanned aircraft.

However, the 2005 FAA AFS-400 UAS “policy” errantly relies for “authority” on AC 91-57 issued 24 years earlier which contains only voluntary guidelines relating to Model Aircraft/UAVs. There was/is no actual law/regulatory distinction between Model Aircraft/UAVs flown for business purposes and one flown for recreational purposes.

Then in February 13, 2007 the FAA realizing the lack of actual authority and inconsistencies in the 2005 memo, published a 2007 “policy statement” in the Federal Register.⁹ The 2007 Policy Statement starts by defining “unmanned aircraft” as “a device that is used, or intended to be used, for flight in the air with no onboard pilot” and it includes “a remotely controlled model airplane used for recreational purposes.” It *acknowledges* that the only FAA guidance with respect to model airplanes is AC 91-57, with the new *claimed* limitation that AC 91-57 applies to model airplanes flown for “hobby or for recreational use.” It mislabels Model Aircraft/UAVs as “Unmanned Aerial Systems” [“UAS”] because it fit the FAA’s nomenclature which they had defined and the FAA then articulates a new alleged rule, couched as a FAA “policy.”

Then, the new FAA “policy” for “UAS” operations was that “no person may operate a “UAS” in the National Airspace System without specific authority.” For “UAS” operating as public aircraft the FAA claimed the alleged authority is the COA. For “UAS” operating as civil aircraft the FAA claimed the authority is special

⁹See “Unmanned Aircraft Operations in the National Airspace System, Docket No. FAA-2006-25714; Notice No. 07-01, 72 Fed. Reg. 29 at 6689 (Feb. 13, 2007)

airworthiness certificates, and for Model Aircraft/UAVs the “authority” is AC 91-57.¹⁰

For the first time ever, the 2007 Notice purported to articulate two new alleged “rules”: (1) Model aircraft can no longer be operated for a “business” purpose; and (2) a Model aircraft operated for a business purpose requires a COA, or special airworthiness certificate and therefore is subject to the FAR’s.

To be clear, the 2007 Notice announces a prohibition/Ban on Model Aircraft/UAVs that the FAA errantly reclassifies as “UAS,” Despite knowing there are significant differences between small Model Aircraft/UAVs and a military type “UAS/Drones.” The FAA then claimed “no person may operate a UAS in the National Airspace System without specific authority.” However, the legal/regulatory framework requiring a Model Aircraft/UAVs or even UAS operator to obtain “specific authority” or a COA is not found in any actual law or regulation.

So then beginning in 2007 and based only on the above new FAA internal “policies” and without citing to any actual enforceable law, or any FAR, the FAA then sent various cease and desist notices to Model Aircraft/UAVs commercial operators describing the COA process and threatening to impose a \$10,000 fine if they did not comply with the new FAA claimed policies which purported to unilaterally create a “ban” on using Model Aircraft/UAVs for “commercial purposes.”¹¹

This was the FAA putting the “cart before the horse” or in aviation parlance “the plane before the propeller.” “General statements of policy are statements issued by the

¹⁰ See http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153

¹¹ See <http://motherboard.vice.com/blog/these-are-the-companies-the-faa-has-harassed-for-using-drones> & <http://diydrone.com/m/blogpost?id=705844%3ABlogPost%3A1551726>

agency to advise the public *prospectively* of the manner in which the agency *proposes* to exercise a discretionary power.” [See: Attorney General’s Manual on the Admin. Procedure Act (1947), Note 3.] Policy statements control only the actions of an agency’s own personnel, not those of the general public. [Decisional Order p. 5]

The FAA’s attempt to retroactively distinguish Model Aircraft/UAVs based on the nature of their operations, commercial vs. non-commercial is unenforceable and not supported by any actual law, or regulation. That distinction has only been made via FAA internal/interim memos and public notices and not by proper APA rulemaking. Notices are not rules, they are not enforceable as law. [Decisional Order p. 5]

In 2012, following the FAA’s attempts to regulate using internal policy memos, inter alia, Congress enacted the Federal Aviation Administration Reform and Modernization Act, [“FRMA”].¹² In the FRMA Modernization legislation, Congress tasked the FAA to come up with a plan for the “safe integration” of “UAS/Drones” by September 30, 2015. However, Model Aircraft/UAV have not been defined in any current enabling statutes or regulations. The only place Model Aircraft have been referred to in a statute is the FMRA. The FMRA defines “Model Aircraft” but *only* for the purpose of defining the *scope* of the FAA’s regulatory authority with respect to Model Aircraft. In fact, the FMRA specifically prohibits the FAA from creating any rule or regulation for Model Aircraft.¹³

Unfortunately and for whatever reason, the FAA has fallen way behind on their Congressional mandates and has instead attempted without regulatory authority to curtail

¹² Pub. L. 112-95 § 332(a), 126 Stat. 11 (2012)

¹³ Pub. L. 112-95 §336 (c)(2), 126 Stat. 78; § 336(a)(1)-(5), 126 Stat. 77

civilian Model Aircraft/UAVs activity by asserting in the 2005/2007 internal FAA policy statements that “commercial/business” operations are banned/prohibited and that some or all of the FARs apply to Model Aircraft/UAVs.¹⁴

These mis-actions and omissions by the FAA over the last nearly a decade have been nothing short of an attempted Fraud, Intentional/Negligent Interference with business/contractual relationships/economic advantage and the Intentional/Negligent Inflicting of Emotional distress perpetrated by the FAA on American citizens and businesses. Unfortunately for these *Amici* and likely known to the FAA, by Federal Statute, the FAA can’t be successfully sued for these torts.¹⁵

Obviously, Congress would not have tasked the FAA to come up with a plan and regulations, if regulations already existed. The FAA would not have indicated they are currently “developing regulations” if regulations already existed. The FAA would not “expect to publish a proposed rule” for UAS/Drones, if such rules/regulations already existed.¹⁶

Neither the FAA’s “made up Ban” on the commercial use of Model Aircraft/UAVs nor the application of the FARs (such as §91.13) are currently legally enforceable. The FAA has failed to comply with the requisite APA rule/lawmaking procedures required to actually put in place such new regulation/law. [See Decisional Order p. 4-7, Pirker Motion to Dismiss p. 13-15]

As a result of all of the above, devices that for decades have been referred to as

¹⁴See <http://www.faa.gov/news/updates/?newsId=76240>, alleged Myth #1-3

¹⁵ 28 U.S 2680

¹⁶ See <http://www.faa.gov/news/updates/?newsId=76240>, alleged Myth #5

Model Aircraft/UAVs are by the FAA and media increasingly referred to as “UAS/Drones,” and the media coverage has generally been negative, particularly with respect law enforcement use, alleged privacy concerns and safety.¹⁷ Most recently, our National Parks, who host thousands of tourists and emission spewing vehicles each year have now banned “Drones” citing concerns about wildlife.(?)¹⁸

In an attempt to enforce FAA internal policy statements as law or a “Ban,” the FAA has and continues to present to wrongfully, without any actual legal authority threaten numerous US citizens/business with regulation/fines. [Ibid p. 9 fn. 11]

Based on the all papers filed by the parties in this case, the Decisional Order and this *Amici Brief*, it is legally undisputable that the FAA has never had and currently does not have any actual legal/regulatory basis to threaten/fine, or regulate Mr. Pirker or Model Aircraft/UAVs operators using their models for any recreational, or commercial purpose, provided they are not flying in FAA “navigable airspace.”

This Order of Assessment case against Mr. Pirker is the first in FAA, Model Aviation/UAV history where the FAA has actually issued such an Order of Assessment in their multifaceted misguided attempts to regulate Model Aircraft/UAV.

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¹⁷ See “Rise of Drones in U.S. Drives Effort to Limit Police Use”, *New York Times*, 2/15/2013 at A1; See “As Drone Use Grows, So Do Privacy, Safety Concerns,” *Detroit Free Press*, 3/7/2013.

¹⁸ See <http://www.reuters.com/article/2014/05/06/us-usa-drones-parks-idUSBREA4501S20140506>

2. LEGAL DISCUSSION

PROCEDURAL ISSUES

I. The FAA Did Not have Jurisdiction over Mr. Pirker's Flight, his Model Aircraft/UAV, or the Airspace Transited

The touchstone analysis in this case is procedural; did the FAA actually have the legal/enforcement authority they have attempted to exert over Mr. Pirker? With respect to the citizenship issues, those issues have been adequately addressed by Mr. Pirker's counsel in his *Motion to Dismiss*, p.10. This section of this brief will address the procedural issues of the FAA's lack of jurisdiction over Mr. Pirker's flight, Model Aircraft/UAV and the Airspace Transited. [See Decisional Order p. 4]

A. The Flight

There is no evidence the flight ever entered FAA navigable airspace and thus under current federal law/regulations the FAA never had jurisdiction over this Model Aircraft/UAV photo flight. [See also Discussion below, C. Airspace Transited]

B. The Model Aircraft/UAV

The Model Aircraft/UAVs used was a 4.5 pound electric Zephyr glider which was not certificated, or required to be certificated under FAR Part 21., Section 21.1.71, et seq and FAR, Part 47, Section 47.3, or any other any actually applicable FAR.

No provision of the United States Code addresses or refers to Model Aircraft/UAVs, nor can the FAA point to any subsequent FAR or case law that addresses the same. [See Introduction *infra* p. 5-6, Decisional Order p. 4] Thus the lack of Statute, FAR or case law demonstrates that the FAA lacked any regulatory authority over the Model Aircraft/UAVs flight.

Indeed, the FAA does not even charge Mr. Pirker with any alleged violation

related to the alleged “aircraft’s” lack of certification, or Mr. Pirker’s lack of a pilot’s license to operate said “aircraft.” The FAA’s failure to levy such charges undermines the FAA claim Mr. Pirker’s model was an “aircraft” for regulatory purposes. [See FAA Complaint ¶ 3, Discussion Section III below and Decisional Order p. 2]

C. The Airspace Transited

The FAA in its opposition to the Pirker *Motion to Dismiss* at p. 5, misinterprets the decision in *United States v. Christianson* 419 F.2d 1401, 1404 (9th Cir. 1969). In that case, the Court indicated the events which led to the 1958 Federal Aviation Act were a series of fatal air crashes between civil and military aircraft and thus there was a need to create an agency to create a unified system of air traffic for civil and military aircraft. The *Christianson* Court did not as the FAA asserts, grant authority to the FAA to regulate “all airspace over the United States.”¹⁹

In defining the FAA’s jurisdiction, Congress could have used the term “all airspace everywhere”; they did not. It is clearly established by both statutory and case law that the FAA’s authority over airspace is limited to *navigable* airspace, which is defined as, “airspace above the minimum altitudes of flight . . . including airspace needed to ensure safety in the takeoff and landing of aircraft.”²⁰

The minimum safe altitudes for flight for fixed wing aircraft over the University of Virginia, a “congested” area, is 1000ft AGL, meaning the floor of

¹⁹See FAA Response note 315, at 5, quoting *United States v. Christianson*.

²⁰49 U.S.C. § 40102(a)(32); 49 U.S.C. § 40103 (b)(1); 14 CFR §§ 1.1, 91.119(a-c); Many courts have held that 500 feet AGL is the floor of navigable airspace for takings claims. See *Persyn v. United States*, 34 Fed. Cl. 187 (Fed. Cl. 1995) *aff’d*, 106 F.3d 424 (Fed. Cir. 1996); *Powell v. United States*, 1 Cl. Ct. 669 (Cl. Ct. 1983); *A. J. Hodges Indus., Inc. v. United States*, 355 F.2d 592, 594 (Ct. Cl. 1966).

“navigable airspace” is 1,000 ft AGL and the ceiling of non-navigable airspace available to Model Airplane/UAVs would be below 1000 ft. AGL. [See FAR §91.119 (b)].

This case should and could have been dismissed on any or all these procedural grounds, as the FAA had no jurisdiction to issue the Order of Assessment, *ab initio*.

This Distinguished Board’s Order should address the procedural issues of the the lack of FAA jurisdiction over Mr. Pirker, the Model Aircraft/UAV and the airspace transited.

SUBSTANTIVE ISSUES

I. The ALJ was correct in Finding that the Ritewing Zephyr Power Glider Respondent Operated in the Vicinity of the University of Virginia Was Not an “Aircraft” as Defined in 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1

The FAA has restated and inaccurately re-defined the real issue decided by the NTSB Judge Geraghty which is now before this Distinguished Board. In finding Mr. Pirker’s model powered glider was not an “aircraft” as defined in 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1, Judge Geraghty properly analyzed the real and actual issue as follows:

Is a model powered glider/Model Aircraft/UAVs under historical definition and practice an “aircraft” subject to regulatory enforcement by the FAA.

The clear and undeniable answer to this actual pending legal issue, based on current law, is NO, as Judge Geraghty has properly ruled. [Decisional Order p. 2-3]

The FAA has been tasked in the FMRA with formulating safety regulations for certain UASs/Drone, and perhaps to some extent in the future, Model Aircraft/UAVs as they increase in capability and sheer numbers. However, currently, no such actual/enforceable regulation exists. In fact, in the FRMA, Congress has defined Model

“navigable airspace” is 1,000 ft AGL and the ceiling of non-navigable airspace available to Model Airplane/UAVs would be below 1000 ft. AGL. [See FAR §91.119 (b)].

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Aircraft/UAVs and has prohibited the FAA from making any rule or regulation for Model Aircraft/UAVs.²¹

On this more properly framed issue and based on a proper analysis of the FAA historically distinguishing between actual “aircraft” subject to FAR regulatory enforcement and Model Aircraft/UAVs subject only to the FAA AC 91-57 requested voluntary compliance, Judge Geraghty ruled:

“1. Neither the Part 1, Section. 1.1, or the 49 U.S.C. Section 40102(a)(6) definitions of “aircraft” are applicable to, or include a model aircraft within their respective definition.

2. Model aircraft operation by Respondent (Pirker) was subject only to the FAA’s requested voluntary compliance with, the Safety Guidelines stated in AC 91-57.” [Decisional Order p. 7]”

The FAA argues that Respondent was operating a “device or contrivance” designed for flight in the air and, therefore, subject to FAA’s regulatory authority. The term, “contrivance” is used in 49 U.S.C Section 40102(a)(6), whereas 14 CFR Part 1, Section 1.1, defines an “aircraft” as a “device;” however, the terms are basically synonymous, as both refer to an apparatus intended or used for flight. [Decisional Order pps. 2-3]

Inconsistent with their present assertions, the FAA did not charge Mr. Pirker with violations related to the alleged “aircraft,” like lack of certification, or Mr. Pirker’s lack of a pilot’s license to operate said “aircraft.” The FAA’s sole charge against Mr. Pirker is alleged “careless or reckless operation of an aircraft.” Thus by their own lack of supportive/consistent charges in this case, the FAA undermines their assertion Mr. Pirker was operating an “aircraft” as defined for regulatory purposes. [Decisional Order p. 2]

²¹FRMA, Pub. L. 112-95 § 336(a)1-5, 126 Stat. at 77

In addition, historically the FAA has *never* required a Model Aircraft/UAVs operators to comply with requirements of FAR Part 21, Section 21.1.71, et seq and FAR, Part 47, Section 47.3, which require Airworthiness and Registration Certification for the operation of actual “aircraft.” The FAA has never before required Model Aircraft/UAVs operators have FAA pilot and medical certifications; the FAA/NTSB, have never in history investigated of the collision of Model Aircraft/UAVs.

It is unlikely that the FAA overlooked these requirements since 1958, rather the clear inference and in fact historical evidence/precedent is that the FAA has distinguished Model Aircraft/UAVs as a class of devices/contrivances excluded from actual “aircraft” regulatory and statutory definitions. [Decisional Order pgs. 2, 3]

The FAA has, historically in their policy notices, modified the term “aircraft” by prefixing the word “model,” to distinguish the device/contrivance being considered. By affixing the word, “model” to “aircraft” the reasonable inference is that the FAA intended to distinguish and exclude Model Aircraft/UAVs, from either/both the aforesaid definitions of “aircraft.” [See FAA AC 91-57 supra p. 5, Decisional Order pgs 2, 3]

In their opposition to Respondents Motion to Dismiss and their briefing herein the FAA again makes the preposterous argument that the definition of the term “aircraft” for purposes of current regulatory authority is so broad as to include everything that flies through the air. [See Decisional Order p. 3]

To accept FAA’s interpretive argument would lead to the conclusion that those definitions include as an “aircraft” all types of devices/contrivances intended, for, or used for, flight in the air. “The extension of that conclusion would then result, in the risible argument that a flight in the air of, e.g., a paper aircraft, or a toy balsa wood

glider, could subject the “operator” to the regulatory provisions of FAA. Part 91, Section. 91.13(a).” [Decisional Order p. 3]

Another logical extension of this errant FAA assertion would be to suggest the FAA has regulatory authority to monitor every country club and sports field in the nation...because every golf ball, tennis ball, football, baseball, frisbee, or even thrown rock, which are “device/contrivances” designed to “fly through the air” would be subject to FAA’s regulatory authority. Indeed, by the FAA’s present interpretation, the collision of two frisbees on the beach would require the FAA and NTSB *by law* to investigate.²²

The FAA has gone so far *afield* of actual enforceable regulatory authority, they recently threatened the Washington Nationals’ professional baseball team with administrative action/fines for using a Model Aircraft/UAVs to film baseball practices. When contacted by the AP, the National’s response was “No, we didn’t get it cleared, but we don’t get our pop flies cleared either, and those go higher than this thing did.”²³

In another example, the FAA has repeatedly harassed, threatened and interfered with a company’s lawful use of Model Aircraft/UAVs engaged in humanitarian search and rescue efforts across the country. As a result, Texas Equusearch, a Non-profit Company, who has succeeded in helping law enforcement and families find their missing loved ones, has filed a Petition for Review of the FAA Order to Cease and Desist its’ humanitarian search and rescue efforts using cameras mounted on Model

²² 49 USC § 1132; 49 CFR Sec. 831.2, states, in relevant part, that the NTSB “is responsible for . . . all accident and incident investigations . . . where the accident or incident involves any civil *aircraft*...”

²³<http://arstechnica.com/tech-policy/2014/03/washington-nationals-face-faa-penalty-for-using-drone-to-take-promo-pictures/>

Aircraft/UAVs.²⁴

“Accepting Complainant’s overreaching interpretation of the definition “aircraft” would result “*reductio ad absurdum*” [Latin: “reduction to absurdity”] in assertion of FAR regulatory authority over any device/object used or capable of flight in the air regardless of the method of propulsion or duration of flight.” [See Decisional Order, fn. 24, p. 7]

A Model Aircraft/UAV has never historically and is not currently an “aircraft” as defined in 49 U.S.C. § 40102(a)(6) and 14 C.F.R. § 1.1. A Model Aircraft/UAV is not currently subject to FAA regulatory enforcement for operations outside of navigable airspace.

II. The ALJ was correct in Finding that Respondent’s Operation of the Ritewing Zephyr Power Glider Aircraft as Described in the Complaint Was Not Subject to Regulation Under the Federal Aviation Regulations

On this limited issue and based on a proper analysis of the FAA historically distinguishing between actual “aircraft” subject to FAR regulatory enforcement and Model Aircraft/UAVs subject only to the FAA AC 91-57 voluntary compliance and the fact that FAA policy notices do not and cannot substitute for actual enforceable regulatory law, Judge Geraghty properly ruled:

“3. As Policy Notices 05-01 and 08-01 were issued and intended for internal guidance for FAA personnel, they are not a jurisdictional basis for asserting Part 91 FAR enforcement authority on model aircraft operations.

4. Policy Notice 07-01 does not establish a jurisdictional basis for asserting Part 91, Section 91.13(a) enforcement on Respondent's model aircraft operation, as the Notice is either (a) as it states, a Policy Notice/Statement and hence non-

²⁴See *Texas EquuSearch v. FAA*, Case No. 14-1061, Document 1481916, filed in the U.S. Court of Appeals for the D.C. Circuit]

binding, or (b) an invalid attempt of legislative rulemaking, which fails for non-compliance with the requirement of 5 U.S.C, Section. 553, Rulemaking.

5. Specifically, at the time of Respondent's model aircraft operation, as alleged herein, there was no enforceable FAA rule or FAR Regulation, applicable to model aircraft or for classifying model aircraft as a UAS."

All arguments made hereinabove in section II apply equally herein. In addition, the FAA has not and cannot cite to any actual regulatory law, that regulate or even address, Model Aircraft/UAVs.

The FAA administrative internal policy statements as discussed supra on pgs. 7-9 and in Judge Geraghty's Order pgs. 4-7 are not binding on the general public and have not followed required APA rulemaking process to be enforceable as regulatory laws.²⁵

As this Distinguished Board is well aware, actual enforceable law, with respect to regulating aviation, or actual "aircraft" exist in only three forms: Federal Statutes, Federal Regulations and Federal Case law, where the statutes/regulations have been interpreted. If no law exists in these forms, then no applicable law exists. That is exactly the case here.

As is well known to this Distinguished Board and by way of review, Federal Statutory law is enacted by Congress and found in the *United States Code*. The Federal *statutes* that govern aviation are found in Title 49 USC Sec. 44101, *et seq.*, and have the force of law.

Current Federal Aviation Statutes find their roots in the Federal Aviation Act of 1958, [See fn. 22, above] as revised. Most importantly, it established the FAA, and granted it power to oversee and regulate matters relating to the safety and use of

²⁵ See *Syncor Intern. Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997), Decisional Order p. 5]

navigable airspace though the promulgation of regulations. As such, although the US Code addresses aviation law in broad terms, the details of aviation laws are actually found in the FARs. No federal statutes address Model Aircraft/UAVs.

The FARs are found in 14 CFR 1.1, *et seq.* and have the force of law. The FARs are the only Regulations that exist pertaining to aviation, and are the only Regulations that are legally enforceable. Currently, no FAR regulates, or for that matter, even mentions Model Aircraft/UAVs.²⁶

Notably, various FARs do address various other craft, such ultra lights, hot air balloons, unmanned rockets and even kites. So the FAA clearly contemplated other devices/contrivances capable of flight through the air other than airplanes and helicopters when it adopted the current FARs. If the FAA had intended to regulate Model Aircraft/UAVs as well, it would have done so in the FARs. It did not.²⁷

Federal Case Law. Federal *case law* is comprised of the various decisions made by adjudicative bodies like the NTSB, concerning FAA enforcement actions. In this case, the FAA issued an Administrative Order of Assessment. That Order was challenged in Mr. Pirker's "Motion to Dismiss." NTSB Judge Geraghty issued his Decisional Order. That Order and is now on Appeal to this full NTSB Distinguished Panel. This Board's decision may be appealed by either party to the U.S. Court of Appeals, DC Circuit, if there is proper legal basis.

Whatever the final decision is in this matter, at whichever stage the controversy ends, will become precedent and will carry the force of law under the legal doctrine of

²⁶ See http://www.faa.gov/regulations_policies/faa_regulations/

²⁷ FARs parts 101 and 103

stare decisis.²⁸

Other than this case, there is currently no precedential decision by the NTSB at any level or the U.S. Court of Appeal, that addresses any type of attempted enforcement of FARs on an operator of a Model Aircraft/UAVs.

Thus, this case is historic and will be the only precedential decision in existence on these matters of significant importance to thousands of US citizens and businesses involved in the Design/Manufacture and use of Model Aircraft/UAVs and the unlimited business and recreational uses they offer.

III. Safety Policy Considerations

The first and primary concern in these matters should be aviation safety within applicable law. We would hope that aviation safety is the FAA's primary concern in their actions as opposed to political/public pressures. However, as a practical matter, over the past several years flocks of birds posed a greater risk to aviation safety than isolated Model Aircraft/UAVs flights, recreational, or commercial.

As we all learned from Captain Sullenberger's heroic and fortunate flight 1549, the so called "Miracle on the Hudson" a flock of birds can affect the airworthiness of a commercial jet. Whereas, there is no documented instance of a Model Aircraft/UAVs interfering with a real "aircraft's" flight.

Perhaps as part of this NTSB Order, it might suggest to the FAA that it would be a more beneficial expenditure of FAA resources to focus on the task updating AC 91-57, and not further attempting to enforce FAA policies posing as enforceable law. Perhaps

²⁸Lat. "to stand by that which is decided." The principal that the precedential decisions are to be followed by the Courts.

the NTSB's Order should suggest the FAA follow proper APA rulemaking procedures with the goal of issuing enforceable FARs to address known and demonstrated safety risks.

The FAA posted Values/Core Values on their website indicates;

"...Integrity is our touchstone. We perform our duties honestly, with moral soundness, and with the highest level of ethics."

"...Integrity is our character. We do the right thing, even if no one is looking. People are our strength. We treat each other as we want to be treated."

The FAA Vision statement indicates;

"We strive to reach the next level of safety, efficiency, environmental responsibility and global leadership. We are accountable to the American public and our stakeholders."

It is long past the time the FAA honor these fine words respecting and accurately accounting to the American public the current lack of actual law/regulations for Model Aircraft/UAVs.

It is very troubling that for years, the FAA has seemingly bullied, propagandized and promulgated total fallacies, namely that the FAA has any regulatory authority over Model Aircraft/UAV's because the FAA had not followed proper APA rulemaking procedures.

The FAA's purported and attempted total ban on commercial Model Aircraft/UAVs operations has actually had the effect of causing American skies to be less safe. Some of the *Amici* and others similarly situated are exceptionally qualified to fly Model Aircraft/UAVs with their Model Aircraft/UAV experience, private,

commercial or ATP pilot training, licenses and instructor ratings. However, these experienced operators and licensed pilots familiar with the FARs, airspace and safe operating procedures are currently reluctant to commercially operate Model Aircraft/UAVs or be involved, for fear of the FAA seeking an enforcement action against them or their actual pilot's licenses.

Thus, the FAA's bullying, and asserting FAA internal policy for actual law has in effect created a less experienced pool of Model Aircraft/UAV operators as the more experienced Model Aircraft/UAV operators and trained and qualified certificated actual pilots are compelled to sit on the sidelines. During the time of the FAA alleged ban and continuing today less experienced Model Aircraft/UAV operators and non-certificated pilots have established commercial businesses and are gaining a foothold in the industry.

At the headwind like pace the FAA is going with UAS integration, the unskilled and inexperienced pseudo-pilots stand to have a massive advantage in the market by capturing much of the market share before the more experienced pilots are integrated with the FAA's "blessing." The broad ranging effect of the FAA's policies, not actual regulation has already and is continuing to punish and discriminate against more experienced operators and actual pilots and has already substantially compromised the safety of Model Aircraft/UAV commercial industries.

The FAA's mishandling of these matters as described hereinabove has had a significant and chilling effect on these *Amici* and countless other similarly situated in lost lives, injury, lost opportunity, lost time, lost resources, lost income and has continued way to long.

///

3. CONCLUSION

For all the foregoing reasons, Judge Geraghty's Decisional Order should be upheld/confirmed in its entirety.

In addition, it is respectfully requested this Distinguished full NTSB Panel clarify the current lack of FAA regulatory authority over Model Aircraft/UAV's in non-navigable airspace and that Model Aircraft/UAVs are not for regulatory purposes military type, UASs.

In addition, it should be made clear the FAA is not allowed to substitute their own internal policies memos for valid and enforceable rules/law that have followed APA rulemaking procedures, or engage in cease and desist practices with the American public in the absence of actual supportive regulatory law.

CURRAN & CURRAN LAW

Dated: 5/7/14

By: 
MICHAEL D. CURRAN, Esq./ATP
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Attorney for Clients/Amici

CERTIFICATE OF SERVICE

I hereby certify that on this date I have sent by United States certified mail, postage prepaid, return-receipt requested, a copy of this firm's Amici Brief in *Administrator v. Pirker*, Docket No, CP-217, addressed to:

Brendan M. Shulman, Esq.
Kramer, Levin, Naftalis & Frankel, LLP
117 Avenue of the Americas
New York, NY 10036

Mr. Peter J. Lynch, Esq.
Ms. Susan S. Caron, Esq.
Enforcement Division, AGC-300
FAA Office of the Chief Counsel
800 Independence Avenue, S.W.
Washington, D.C. 20591

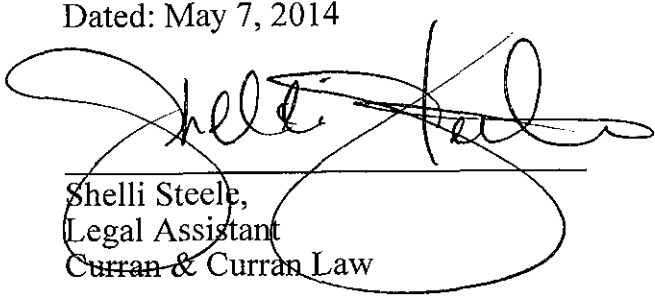
In addition, I hereby certify that I have this date placed in the United States mail, postage prepaid, certified return-receipt requested, an original and one copy of the foregoing document to:

National Transportation Safety Board
Office of General Counsel, Rm. 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594

In addition, I hereby certify that I have on this date sent a pdf copy electronically via email of the foregoing document to:

ALJappeals@ntsb.gov
BoardAppeals@ntsb.gov
BSchulman@KRAMERLEVIN.com
susan.caron@faa.gov

Dated: May 7, 2014



Shelli Steele,
Legal Assistant
Curran & Curran Law

EXHIBIT A

[Print](#) | [Close Window](#)

Subject: RE: FAA Pirker Appeal NTSB Docket No., CP-217
From: "Schulman, Brendan" <BSchulman@KRAMERLEVIN.com>
Date: Fri, May 02, 2014 9:43 am
To: "susan.caron@faa.gov" <susan.caron@faa.gov>, "mdc@curranlawoffices.com" <mdc@curranlawoffices.com>
Cc: "smc@curranlawoffices.com" <smc@curranlawoffices.com>

Mr. Curran,

Respondent consents to your submission of an amicus brief, and you may use this email as the written consent contemplated by the rule.

Brendan Schulman

Brendan M. Schulman | Special Counsel
T: 212-715-9247 F: 212-715-8220 E: BSchulman@KRAMERLEVIN.com
Kramer Levin Naftalis & Frankel LLP | 1177 Avenue of the Americas | New York, New York 10036
<<http://www.kramerlevin.com/>>

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-----Original Message-----

From: susan.caron@faa.gov [mailto:susan.caron@faa.gov]
Sent: Friday, May 02, 2014 11:38 AM
To: mdc@curranlawoffices.com
Cc: Schulman, Brendan; smc@curranlawoffices.com
Subject: RE: FAA Pirker Appeal NTSB Docket No., CP-217

Mr. Curran - The FAA will not oppose your filing of an amicus brief on behalf of your client in the Pirker case so long as your client otherwise meets the requirements of section 821.9(b).

Susan S. Caron
AGC-300
(202) 267-7721 (telephone)
(202) 267-5106 (fax)

From: <mdc@curranlawoffices.com>

To: "Schulman, Brendan" <BSchulman@KRAMERLEVIN.com>, Susan Caron/AWA/FAA@FAA

Cc: smc@curranlawoffices.com

Date: 05/02/2014 11:27 AM

Subject: RE: FAA Pirker Appeal NTSB Docket No., CP-217

Dear Counsel,

Ex. A

This will confirm my conversation with each of you requesting your consent pursuant to 49 CFR § 821.9 (the relevant text below) to file an Amicus Curiae brief in the FAA Pirker matter, NTSB Docket No. CP-217.

As you have each consented to our filing the Amicus in this matter, please respond to this email and confirm your written consent as required by statute.

Thank you for your courtesy and cooperation in this important matter.

49 CFR § 821.9 Intervention and amicus appearance.

(b) Amicus curiae briefs. A brief of amicus curiae in a matter on appeal from a law judge's initial decision or appealable order may be filed, if accompanied by written consent of all the parties, or by leave of the General Counsel if, in his or her opinion, the brief will not unduly broaden the matters at issue or prejudice any party to the proceeding. A brief may be conditionally filed with motion for leave. The motion for leave shall identify the interest of the movant and shall state the reasons why a brief of amicus curiae is desirable. Such brief and motion shall be filed within the briefing time allowed the party whose position the brief would support, unless good cause for late filing is shown, in which event the General Counsel may provide an opportunity for response in determining whether to accept the amicus brief.

Michael D. Curran, Esq./ATP
CURRAN & CURRAN LAW
90 North Coast Highway 101, Suite 103
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EXHIBIT B

CURRAN & CURRAN LAW

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MICHAEL D. CURRAN, ESQ., ATP
SUSAN M. CURRAN, ESQ.

March 26, 2014

Via PDF email to:

Michael P. Huerta, FAA Administrator
Michael G. Whitaker, FAA Deputy Administrator
Mark L. Warren, FAA Chief Counsel
Alfred R. Johnson, FAA Regional Attorney
Brendan A. Kelly, FAA Supervisory Attorney
Federal Aviation Administration
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Washington, DC 20591

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alfred.r.johnson@faa.gov
brendan.a.kelly@faa.gov

Re: Request to the FAA to Honor FAA Values/Vision Statements on
Current Lack of Actual Law/Regulations for use of Model UAVs.

Dear FAA Administrators,

This letter is a respectful request and challenge to you, our Federal Aviation Administration ["FAA"] leaders, to honor posted FAA Values and FAA Vision Statements on the lack of current law/regulation for the use of civilian Model Aircraft/Unmanned Aerial Vehicles/Drones ["Model Aircraft/UAVs"] for recreational and commercial uses, and for classifying Model Aircraft/UAVs as Unmanned Aerial Systems. ["UAS"]

By way of brief background, I am both a practicing civil trial and aviation attorney as well as professional pilot/instructor who proudly holds a valid and current FAA single and multi-engine Airline Transport Pilot certificate and a Certified Flight/Instrument Instructor Certificate. I am also type certificated and for years held pilot in command ["PIC"] operating authority in various turbo jet aircraft including Cessna Citation C500/C550, flying Citation I/II, Cessna 525/525s flying CJ/CJ1/CJ2/CJ3 and the Aero Delfin L-29/39. I have flown these turbo jet and other aircraft as PIC operationally both nationally and internationally. I have owned several single and multi-engine aircraft over my 24 year aviation career. I divide my professional time between legal/trial work and providing legal consulting/aviation related expertise to clients and other attorneys on aviation related cases and the FARs. I also continue to provide Flight Instruction/BFRs to a variety of pilots and am a Model Airplane/UAV and aerial photography ["AP"] enthusiast. I have often been paid by clients for using UAVs to take aerial photos/video. In over 4000 hours of operating actual aircraft without accident/incident and years of safe Model Aircraft/UAV flying, I have prided myself on following all applicable FARs, complete preparation, using good conservative judgment and being safe in all my professional and recreational aviation related activities.

This letter is also a sincere offer of assistance to consult with the FAA as tasked by Congress, to come up with policies and actual, enforceable Federal Aviation Regulations ["FARs"] to safely integrate Model Aircraft/UAVs to the extent required and actual UAS, into the National Airspace System ["NAS"].

FAA posted Values/Core Values on their website indicates;

"...Integrity is our touchstone. We perform our duties honestly, with moral soundness, and with the highest level of ethics."

"...Integrity is our character. We do the right thing, even if no one is looking. People are our strength. We treat each other as we want to be treated."

The FAA Vision statement indicates;

"We strive to reach the next level of safety, efficiency, environmental responsibility and global leadership. We are accountable to the American public and our stakeholders."

It is long past time the FAA honored these fine words respecting and accurately accounting to the American public the current lack of actual law/regulations for Model Aircraft/UAVs. It is very troubling that for years, the FAA has seemingly bullied, propagandized and promulgated total fallacies, namely that the FAA has any regulatory authority over Model Aircraft/UAV's and that Model Aircraft/UAVs are classified as military type, UASs.

In fact, until the "FAA Modernization and Reform Act of 2012," the FAA and Congress had never even addressed Model Aircraft/UAVs. In the FAA Modernization legislation, Congress told the FAA to come up with a plan for "safe integration" of UAS by September 30, 2015. Congress would not have "told the FAA to come up with a plan" if regulations already existed. The FAA would not have indicated they are currently "developing regulations" if regulations already existed. The FAA would not "expect to publish a proposed rule" for UAVs, if one already existed.

As you know, most recently in the only case on record/history where the FAA has actually sought an Order of Assessment against a Model Aircraft/UAV operator, NTSB Judge Patrick G. Geraghty in the *FAA v. PIRKER*, Docket No. CP-217, in a perfectly legally reasoned and well supported legal opinion, which can only be described as scathing against the FAA's misconstruing law and errant Order of Assessment, ruled;

"1. Neither the Part 1, Section. 1.1, or the 49 U.S.C. Section 40102(a)(6) definitions of "aircraft" are applicable to, or include a model aircraft within their respective definition.

2. Model aircraft operation by Respondent (Pirker) was subject only to the FAA's

requested voluntary compliance with, the Safety Guidelines stated in AC 91-57.

3. As Policy Notices 05-01 and 08-01 were issued and intended for internal guidance for FAA personnel, they are not a jurisdictional basis for asserting Part 91 FAR enforcement authority on model aircraft operations.

4. Policy Notice 07-01 does not establish a jurisdictional basis for asserting Part 91, Section 91.13(a) enforcement on Respondent's model aircraft operation, as the Notice is either (a) as it states, a Policy Notice/Statement and hence non-binding, or (b) an invalid attempt of legislative rulemaking, which fails for non-compliance with the requirement of 5 U.S.C, Section. 553, Rulemaking.

5. Specifically, at the time of Respondent's model aircraft operation, as alleged herein, there was no enforceable FAA rule or FAR Regulation, applicable to model aircraft or for classifying model aircraft as a UAS."

The FAA's attempted prosecution of this case and now Appeal of this opinion is in my legal opinion at least negligent, if not a frivolous further waste of FAA officials' time/taxpayer dollars. NTSB Judge Garaghty was absolutely centered on localizer/glideslope in his legal analysis and critique of the FAA and their errant and misleading definition of "aircraft" and negligent claims of alleged regulatory law, concerning Model Aircraft/UAVs.

Consistent with NTSB Judge Garaghty's Order, in the absence of any FAR, statute, regulation, or case law that prohibits a particular activity, that activity is completely legal. Contrary to FAA assertions, the reverse, meaning the absence of an FAR makes it "illegal," is preposterous and false. Model Aircraft/UAVs are and always have been completely unregulated federally, and anyone is free to operate them in any safe manner they wish, for pleasure or profit, regardless of alleged FAA's internal policies and provided they do not infringe on navigable airspace/airport traffic areas.

Despite the lack of any actual FAR/statute, or case law over the past several years, the FAA has admittedly and knowingly threatened numerous American citizens/businesses with alleged violations of FARs and unenforceable fines of \$10,000 for using Model Aircraft/UAV's in "commercial activities." The FAA has sent numerous letters to American citizens/businesses falsely claiming that commercial operations are using "UAS without proper authorization" and are therefore "in violation of FAA guidance for UAS," or "in violation of FAA mandates for UAS." Nonsense, just not true.

The FAA has also warned Model Aircraft/UAV operators that "operations of this kind may be in violation of the FARs and result in legal enforcement action." The FAA has warned Model Aircraft/UAV operators of alleged "devastating liability" in the event of an accident, and concluded with a command either requiring or "advising" the subject to cease "UAS" operations. These misguided letters have had the intended result of intimidating the American public and their clients from developing, producing and using UAVs for numerous lawful purposes like aerial photography, movies, TV, sports, search and rescue, aerial mapping, law enforcement, and countless others, over the past

several years. This at least negligent misconduct by the FAA, has stunted the industry causing tremendous losses in development, uses and income across the country.

For whatever misguided reasons, the FAA continues to rely on their own illogical interpretation of a dated 1981 advisory circular ("AC 91-57") and various self-serving "policy" statements (like the 2005 AFS-400 UAS Policy and the 2007 Unmanned Aircraft Operations in the National Airspace System, Docket No. FAA-2006-25714; Notice No. 07-01, 72 Fed. Reg. 29 at 6689) which are nothing more than internal FAA policies binding only on the FAA, as a substitute for actual enforceable FARs or other actual enforceable law which has followed rulemaking processes pursuant to the Administrative Procedures Act ["APA"].

As you know, on February 26, 2014, to try to buttress its' negligent and unsupportable positions concerning Model Aircraft/UAVs, the FAA published on its' website a document entitled, "Busting Myths about the FAA and Unmanned Aircraft." It purports to dispel "common myths" and provide "corresponding facts." In fact, it is nothing more than a negligent self-serving rehash of errant/misleading information, FAA policies and opinions posing as regulations, which has been promoted by the FAA since 2007. As Judge Garaghty has ruled, the FAA's alleged "Busting Myths" document cites no actual relevant FAR, or case law to support its claims, because none currently exist.

For example, in the most recent alleged "Busting Myths" version, the FAA continues to misrepresent that Model Airplanes/UAV are "aircraft" within the meaning of the FARs. In fact, this negligent misrepresentation has already been adjudicated as untrue by the NTSB Judge Garaghty. His decision clearly states that, "neither the Part 1, Section. 1.1, or the 49 U.S.C. Section 40102(a)(6) definitions of "aircraft" are applicable to, or include a model aircraft within their respective definition." With respect to the FAA misrepresenting their own internal policies as regulatory authority, Judge Garaghty ruled;

"As Policy Notices 05-01 and 08-01 were issued and intended for internal guidance for FAA personnel, they are not a jurisdictional basis for asserting Part 91 FAR enforcement authority on model aircraft operations." and;

"Policy Notice 07-01 does not establish a jurisdictional basis for asserting Part 91, Section 91.13(a) enforcement on Respondent's model aircraft operation, as the Notice is either (a) as it states, a Policy Notice/Statement and hence non-binding, or (b) an invalid attempt of legislative rulemaking, which fails for non-compliance with the requirement of 5 U.S.C, Section. 553, Rulemaking."

In addition the FAA sites to "Public Law 112-95" to claim some regulatory authority over Model Aircraft/UAVs. However, the FAA fails to mention that "Public Law 112-95," Sections 331(6), (8), (9) and Section 336(c) apply to the FAA only and not to the public, and that it is a prospective law, the terms of which will take effect on a future date, when regulations are adopted. Even more deceptively, the FAA refers to this law throughout its revamped page, as "Public Law 112-95," instead of its' more common name, the "FAA Modernization and Reform Act of 2012." The FAA has clearly promoted

these misrepresentations and falsities, in an attempt to mislead the American public into thinking there exists some other law that gives the FAA authority over Model Aircraft/UAVs. In fact, "Public Law 112-95" and the "FAA Modernization and Reform Act of 2012" are one in the same.

As each of you know, despite overwhelming legal authority, or lack thereof, the FAA currently has negligently appealed Judge Garaghty's decision and is continuing to try to mislead the American public by directing them from the FAA press release regarding the *Pirker* decision, back to the FAA's misleading and errant "Myth Busting" post which even after two revisions on March 8, 2012 inexplicably continues to negligently misrepresent Model Aircraft/UAVs are "Airplanes" for regulatory purposes and the FAA has the current authority to regulate Model Aircraft/UAVs and that authority is "stayed pending appeal." In other words, the FAA currently is still trying to mislead the American public into believing that alleged FAA regulatory authority, which never actually existed concerning Model Aircraft/UAVs... is now "stayed pending appeal." Did you hear the screech of brakes and roar of thrust reversers...please repeat, FAA?

For an excellent factual/legal analysis written by Connecticut Attorney Peter Sachs in his "Drone Law Journal," please see his most recent versions of "Busting the FAA's Myths Busting Document," most recent because the FAA has modified the site several times, in particular after Judge Garaghty's Order, causing Mr. Sachs to again respond to the FAA's new misstatements and propaganda. (See, <http://dronelawjournal.com/drone-law-news/>)

Despite all of this, the FAA has been and is still suggesting to the American public that the FAA has the ability to regulate/enforce Model Aircraft/UAV's for recreational/commercial uses. These threats, misconceptions/misinformation are at least negligent, if not unconscionable and must be immediately corrected. The FAA has promoted these various fallacies quoting the objective of public safety, which we can all agree should be the primary concern. However, negligently misrepresenting the actual applicable law/regulation because the FAA is behind on congressional mandate to develop regulations, policies and standards for Model Aircraft/UAVs, or for whatever commercial/financial reasons, is at least negligent, if not intentional and reprehensible.

As a final observation, it is defies logic and undermines actual FAA mandates of NAS safety, that apparently the FAA's current position is that a non-FAA rated Model Aircraft/UAS "pilot" or just a kid with no training with can fly his/her 55 pound or less Model Aircraft/UAS for recreational purposes subject only to AC 91-57 voluntary guidance and yet an experienced FAA ATP/Commercial or other rated pilot familiar with existing FARs and the NAS, allegedly cannot fly his/her 5 pound Model Aircraft/UAV for a "commercial" purpose to assist in Search and Rescue, take an aerial photo, work on movie shoot or provide aerial mapping. Obviously "safety" is not the actual motivator/political concern. We suspect that there is far more behind the FAA's motivations. Perhaps it is application fees for currently un-required Certificates of Operating Authority ["COA"], perhaps it is the millions, if not billions, in profits for Department of Defense contractors and other large aviation companies in this rapidly developing industry, currently in its relative infancy.

Whatever the actual motivation, it is long past time misguided FAA administrators honestly, follow FAA stated values and with "moral soundness and the highest level of ethics" report and account to the American public and their stakeholders about the lack of current Model Aircraft/UAV law/regulation, and their progress on the same. The FAA should at long last correct themselves so that until there is actual law/regulation that has followed APA procedures, the American public should not continue to be stunted, intimidated, threatened and financially damaged by the FAA and prevented from pursuing safe, legal recreational/commercial development/uses of Model Aircraft/UAVs.

I am also concerned that the FAA is exposed to a variety of public lawsuits from already filed FOIA requests, Complaints for Injunctions, to Federal Government Tort Claims for negligence and negligent misrepresentations made by FAA Administrators and spokespersons to the American public causing them lost income and other damages. As well, the continuing negligence and negligent misrepresentations contained on the FAA website in the above referenced "Busting Myths about the FAA and Unmanned Aircraft," inter alia, which currently perpetuate false/misleading information causing numerous individuals/companies to lose income on a daily basis.

I respectfully provide the above facts and information, NTSB Judge Garaghty's Order and the excellent briefs written by Mr. Pirker's counsel Brendan Schulman, Esq. in the *FAA v. Pirker* case, as well as the various excellent legal analysis' in Peter Sachs, Esq. "Drone Law Journal," in the hope that the FAA honor their Value and Vision statements with the American public concerning the current lack of actual law/regulations for the use of Model Aircraft/UAVs for recreational/commercial uses.

We can all agree that Model Aircraft/UAVs have advanced such that appropriate safety guidance/regulations are needed. By this letter, I also offer my assistance as an experienced attorney, ATP rated professional pilot and flight instructor to assist the FAA as tasked by Congress to come up with policies and actual, enforceable FARs to safely integrate both actual UAS and Model Aircraft/UAVs to the actually extent required, into the NAS.

If I can be of any further assistance, or you have any other questions or concerns, please do not hesitate to contact me directly, in writing.

CURRAN & CURRAN LAW



Michael D. Curran, Esq./ATP

cc: AOPA, All National UAV Associations & Organizations, Model Aircraft/UAV Developers/Operators and All Concerned American Citizens, et al.

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